

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

R II

10,884

FILE: B-191336 DATE: July 30, 1979

MATTER OF: Teleprompter of San  
Bernadino, Inc. DLG 02364

## DIGEST:

1. [Protest concerning whether procurement should be negotiated or advertised] the formats used to issue RFP and amendments thereto and other matters that concern alleged improprieties in the solicitation are untimely raised under our Bid Protest Procedures ~~which~~ filed after the closing date set for receipt of proposals.
2. ~~Where~~ (technical evaluation of proposals disclosed no material differences which justified award on basis of technical superiority; *Therefore,* award on basis of lowest estimated price was proper and in accordance with solicitation award criteria.
3. Agency's use of letter, rather than standard form prescribed by regulations, to amend RFP is a procedural rather than a substantive defect which is not prejudicial to agency ~~or~~ any offeror, *when* all offerors ~~were~~ notified of the changes made and acknowledged *them* in *their* best and final offer. *such changes*
4. *After* Communication ~~with one offeror~~ after receipt of "best and final" offers, to resolve minor informalities and apparent clerical mistakes in offeror's proposal was not conduct of ~~disc~~ *not constitute* discussions with the offeror which necessitated discussions with other offerors in the competitive range. *a necessity for*

Teleprompter of San Bernadino, Inc. (Teleprompter), protests the award of a franchise agreement for a 10 year term to Foley and Associates, Incorporated (Foley) for a cable television (CATV) system at Norton Air Force Base, California) under request for proposals (RFP) F04607-77-R9097.

DLG 02365

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Teleprompter, the incumbent franchise holder, asserts that the Air Force failed to award the franchise agreement on the basis of the criteria contained in the RFP and the provisions of the Defense Acquisition Regulation (DAR) and that the RFP and the negotiations with the offerors contained numerous deficiencies which prejudiced Teleprompter. Teleprompter requests this Office to declare the award to Foley invalid and to direct the Air Force to award the franchise to Teleprompter or conduct a new solicitation consistent with law and regulations. The thrust of the protest centers on Teleprompter's belief that the Air Force erred in awarding the franchise on the basis of price after it concluded that the systems and features proposed by both offerors were, on balance, essentially equal.

For the reasons set forth herein, the protest is dismissed in part and denied in part.

#### BACKGROUND

The RFP incorporated the requirements of a draft revision of Air Force Regulation (AFR) 70-3 which sets forth policies and procedures for CATV systems on Air Force installations. The authority for the award of these franchise agreements is contained in 16 U.S.C. 420 (1976) and 43 U.S.C. 961 (1976). These statutes authorize the heads of Federal departments to grant easements on Federal real property, including military reservations, for, inter alia, television and other forms of communications facilities. In the case of CATV franchises, the majority of the fees proposed will be borne by the subscribers to the CATV service, i.e., occupants of on and off-base housing, airmen's dormitories and bachelor officers' quarters, with a portion payable by the Government for services rendered to appropriated fund activities.

Eleven firms were solicited but only proposals from Foley and Teleprompter were received. Oral discussions were held with both offerors, after which "best and final" offers were requested. Changes in the solicitation necessitated second "best and final" (cost) offers which were received as follows:

<u>Item</u>	<u>Amount</u>	<u>Estimated Number</u>	<u>10 Yr. Total</u>
1. User fee per month for initial outlets		381	
Foley	\$6.85		\$313,182
Teleprompter	7.00		320,040
2. User fee per month for additional out- lets		163	
Foley	1.50		29,340
Teleprompter	1.80		35,208
3. Connection fee (initial hookup)			
a. individual residences		1	
Foley	14.50		14.50
Teleprompter	14.15		14.15
b. Dormitories		19	
Foley	5.00		95.00
Teleprompter	14.15		268.85

<u>Item</u>	<u>Amount</u>	<u>Estimated Number</u>	<u>10 Yr. Total</u>
4. Connection fees for additional outlets		10	
Foley	\$5.00		\$5.00*
Teleprompter	9.55		95.55
5. Reconnection fee for service pre- viously terminated			
a. residences		2085	
Foley	5.00		5.00*
Teleprompter	9.55		19,911.75
b. Dormitories		295	
Foley	3.00		885.00
Teleprompter	9.55		2,817.25
6. Connection fee for relocation of outlet		5	
Foley	5.00		25.00
Teleprompter	9.55		47.75
TOTALS			
Foley			\$354,016.50*
Teleprompter			\$378,403.30

\*Subsequently corrected by extending unit prices as follows:

Item 4 - \$50.00, Item 5(a) \$10,425.00, corrected total \$364,471.50.

Termination charges for which the Government would be responsible in the event of a termination for the convenience of the Government were specified by Foley to be \$49,903.00, and by Teleprompter as \$90,454.32. By the terms of the termination for convenience clause, these charges were to represent an amount "not to exceed the fixed installation costs for the CATV system" less salvage value, and were to be reduced by a sum equal to 1/120th of the total for each month the franchise agreement was in "full service" prior to the date of termination.

In addition to Foley's apparent failure to extend its unit prices for items 4 and 5(a) by the estimated quantities set forth in the solicitation, which the Air Force assumed was the result of a "clerical error," Foley represented its termination charges to be "the amount of net revenue loss which would occur" if the contract were terminated for the convenience of the Government, while its previously submitted data showed the termination charge as being based on the installation costs. Foley also failed to indicate the telephone number for its repair service. Thus on the same date best and final offers were received, the Air Force contacted Foley by telephone to clear up "these minor irregularities." Foley's response, which was acceptable to the Air Force, was later confirmed in writing.

The Air Force accepted Foley's corrected proposal because it offered "[c]onsiderable reduction in all areas of cost which will be passed on to military personnel and their families" and "the other factors listed in the basis of award do not outweigh the amount of the difference in Estimated Total (Items 1-6)." Award was made to Foley for the ten year term beginning June 15, 1978. Teleprompter filed its protest subsequent to the date of award.

UNTIMELY ISSUES

(The protester ~~has~~ raised a number of issues which relate to the solicitation package, ~~itself~~. These include the authority under which the procurement was negotiated, whether the procurement should have been formally advertised, the form used to make changes in the solicitation, and the absence of some indication of the relative importance of the listed evaluation factors.)

It is clear that all of these issues involve alleged improprieties in the solicitation which were apparent prior to the date set for receipt of proposals. Protests based upon alleged improprieties in a solicitation apparent prior to the closing date for proposals must be filed prior to the closing date set for receipt of proposals. 4 C.F.R. 20.2(b)(1) (1978).

*improprieties in the solicitation*  
(As this protest was filed after contract award, these ~~the alleged~~ issues are untimely, and will not be considered on their merits. AAI Corporation, B-192346, November 3, 1978, 78-2 CPD 320.

However, we note that the alleged deficiency in the evaluation criteria is similar to the deficiency we found in Frontier Broadcasting Company, d/b/a Cable Colorvision, 53 Comp. Gen. 676 (1974), 74-1 CPD 138. The Air Force acknowledges that the deficient evaluation criteria used in that case were not completely changed as recommended in Frontier, but advises that the deficiency will be corrected when revised Air Force Regulation 70-3, which sets forth the evaluation factors to be included in solicitations for this type of service, is issued.

PROPOSAL EVALUATION

Teleprompter asserts that the evaluation criteria set forth in the RFP were not properly applied. The criteria were set forth as follows:

"a. Award shall, as a general rule, be made to that responsible, responsive offeror submitting the lowest price in the blank in

Schedule A [CATV Contractor's Fees] entitled 'Estimated Total (Items 1-6),' except that award may be made to other than the lowest offeror if justified by material differences in the configurations of the proposed systems, the quality of the equipment offered, the nature of supplementary services offered, repair capabilities, or the demands that will be made with regard to Government-Furnished property, and the Government's liability upon termination for convenience of the Government."

Thus, the evaluation criteria made price the most significant factor in determining award unless there were material differences between the proposals in certain designated areas.

Teleprompter believes that there were such differences, and that its proposal did not receive sufficient credit for those non-cost factors. For example, Teleprompter asserts that insufficient consideration was given in the evaluation of the supplementary (premium programming) service it offered for subscribers known as Home Box Office (HBO). HBO, for an additional monthly fee and one-time connection charge, allows subscribers to receive recently released motion pictures and other special programming. Teleprompter claims that approximately 33 percent of the individual subscribers to its CATV system at Norton also subscribe to HBO which it believes indicates a high degree of acceptance and demand for this supplementary service. Teleprompter also claims that its existing CATV system at Norton is in general technically equal to the system proposed by Foley and technically superior in that that it is "shadow-trunked" (dual cable) while Foley's is not. Teleprompter also asserts it has a "superior" repair capability, and that there are advantages to its system stemming from Federal Communications Commission (FCC) surveillance of its system. We find no merit to these contentions.

Among other things, the technical requirements of the RFP specified the following:

"If the CATV system is being introduced on the base for the first time or is being substantially rebuilt, the system shall employ the 'hub' concept \* \* \* [and] \* \* \* shall be constructed with dual outgoing plant as a minimum." (Emphasis added.)

As the incumbent franchisee, Teleprompter proposed to continue the operation of its existing system without modification. That system is an extension of the CATV system in operation in the nearby San Bernadino area and is admittedly not configured on the "hub" concept. On the other hand, Foley, as required by the specifications, proposed the installation of a system configured in that manner.

In evaluating proposals, the Air Force concluded that Foley's system configuration was superior to that proposed by Teleprompter and thus gave Foley a higher rating for this aspect of the proposal. The Air Force position is that the "hub" system configuration is more desirable "for quality of reception, service, and other factors."

Teleprompter challenges the "superiority" of the hub configuration at this particular location, claiming it may be appropriate for remote locations, but not when the military base is located in a "highly urban area" which has an existing non-hub system. Teleprompter maintains that the quality of the reception at Norton with its system would be equal to "the acceptable signal received in the urban community." In any event, Teleprompter claims that the language of the specifications (quoted above) makes it clear "that a system already 'in place' was to be considered, in all respects, as having all of the desired characteristics necessary for complete compliance with the RFP."

With respect to the quality of "reception, service, and other factors," Teleprompter has offered nothing beyond its base assertions that the "quality of reception" would remain equal to the signal received in the civilian community to rebut the Air Force contentions that the hub configuration is superior to the base system offered



by Teleprompter. Under these circumstances, we have no basis to conclude that the Air Force technical evaluation was incorrect. The responsibility for such evaluations rests primarily with the procuring activity concerned, and the activity's determination will ordinarily be accepted by this Office unless it is clearly shown to be unreasonable. See SRG Partnership, PC, 56 Comp. Gen. 721 (1977), 77-1 CPD 438. In the absence of any meaningful evidence to the contrary, we are unable to conclude that the Air Force evaluation was not reasonable.

We also do not agree that the Air Force was bound to consider Teleprompter's in-place system as having "all of the desired characteristics necessary for complete compliance with the RFP." We interpret this contention to mean that the in-place system configuration must be considered an equal of any system proposed by a competing firm simply because the incumbent was not required to rebuild or replace it. We believe such a contention is not reasonable under the evaluation clause, which advised offerors that material differences in the configurations of the proposed systems would be considered in the evaluation of proposals. That portion of the clause, would, in our view, be essentially meaningless if a non-incumbent were not able to derive the benefit of that which is considered to be a materially superior configuration merely because the incumbent chose to remain with its present system. Thus, while an incumbent was not required to replace or rebuild its system, it was not prohibited from doing so if it believed that would enhance its competitive position. Teleprompter's interpretation would, in effect, "freeze" the competitive position of its competitors to a level equal to its own, with no investment on its part. We find no merit to this position.

With respect to the dual cable issue, the contracting officer's report indicates that the dual cable feature was proposed by Foley, and Teleprompter has not taken issue with that aspect of the report. We therefore see no purpose in further considering this issue.

Teleprompter's assertion that it should have been recognized for its superior repair capability is based on the CATV service it provided under its prior franchise. Other than referring to that prior service, however, Teleprompter again has offered nothing concrete to indicate that in fact it was superior to Foley in this area. While the adequacy of Teleprompter's repair service has not been questioned, the record shows that Foley's proposed repair capability was also deemed satisfactory on the basis of Foley's proposal to "set up" an office in the Norton area and to man that office on an around-the-clock (24 hour) basis after the system was in operation. In this regard, Teleprompter has not affirmatively demonstrated that Foley's proposed method of providing repair services will result in service inferior to its own.

Likewise, we are not persuaded by Teleprompter's claim that the contracting officer should have considered that its system is subject to unspecified FCC surveillance while Foley's is not; or that the "local government" (San Bernadino) review of its civilian system somehow implies superior performance of the Teleprompter system.

First of all, contrary to Teleprompter's generalized and unsupported assertions, Foley claims that it is subject to the FCC's technical standards so that the Air Force will apparently derive the benefit of FCC regulations to that extent. In addition, Foley points out, and we agree, that the Air Force is capable of regulating the operation of the Norton CATV system without the benefit of the assistance of the City of San Bernadino--which we might add is not even implicitly required by the specifications.

Of major concern to Teleprompter was the Air Force failure to give it significant credit for the HBO feature as a supplementary service.

Although not defined in the solicitation, "supplementary services" are generally understood to be special type programming not available on regular television channels. This would include the "premium"

programming services such as the HBO service available to subscribers from Teleprompter under its prior franchise. HBO is not "produced" by Teleprompter, and it, like other such programming, is purchased by CATV firms from other companies and made available to subscribers at their options for a premium over and above regular monthly subscription rates. Such services are clearly not available exclusively from Teleprompter.

Teleprompter's "best and final" offer alluded to the availability of its HBO service to individual subscribers and the benefits to be derived therefrom. The proposal asserted that "this ~~is~~ <sup>is a</sup> major advantage that should be given strong weight in the evaluation of our proposal." We note, however, that the Teleprompter offer did not commit itself to continue HBO and did not specify the terms under which HBO would be provided. Presumably Teleprompter would continue HBO, as the service provides it with additional revenues, although under the terms of its offer was not legally required to do so. Thus, if it desired, Teleprompter could apparently discontinue the service after award, change to another premium programming package, and modify its user charges or connection fees. This "offer" was thus illusory, in our opinion, as it contained no terms and conditions and was not therefore susceptible of acceptance by the Government. Corbin on Contracts §§11, 16 (1963).

We note that Foley also vaguely "offered" to provide some unspecified "premium programming" as "customer requirements dictate." This "offer" was similarly legally defective.

Notwithstanding the lack of meaningful offers for these supplemental services, the record shows that the contracting officer "weighed this factor somewhat in favor of Teleprompter" because its HBO was already available and was being furnished to about 1/3 of the CATV subscribers at Norton. We cannot say that Teleprompter was entitled to more.

Teleprompter also contends that the contracting officer failed to consider additional costs that could

be associated with the Foley proposal. Teleprompter believes the existing CATV subscribers might be required to bear those costs as a result of a change of contractors because it believes Foley was not legally precluded from charging those subscribers for installation costs, while the existing subscribers to the Teleprompter system would not have to bear those costs if Teleprompter were awarded the contract. Similarly, Teleprompter asserts that the current subscribers to its HBO service could be charged additional connection fees for any premium programming which Foley might eventually offer.

Teleprompter's first assertion stems from the letter amendment to the RFP by which the contracting officer sought to preclude charging current subscribers for installation costs. The contracting officer, by letter, requested new best and final offers from both offerors because of errors discovered in the RFP subsequent to the time original best and final offers were received. That letter modified certain clauses in the RFP, replaced certain pages of the RFP, and contained the following:

"\* \* \* corrections to the request for proposals are forwarded with this letter and new best and final offers are requested.

\* \* \* \* \*

"With regard to items 3, 4, and 5 on schedule A \* \* \* a current subscriber will not be considered to be an initial hookup or reconnection to a CATV system merely because of the transition from the existing CATV franchise \* \* \* to the new CATV franchise agreement \* \* \*. No connection fee is earned unless a subscribers receiver, previously not connected to a CATV system, becomes connected to a CATV system.

"Request that you consider the above information and submit your best and final offer to include resubmitting the following:

a. Schedule A"

No further "amendments" were made to the RFP, i.e., no standard form (SF) 30 (the pre-printed form specified for use to amend RFPs and contracts) was issued. Teleprompter essentially believes that the Air Force's failure to issue a SF 30 somehow eliminated the legally binding effect of the above quoted provisions so that Foley could charge existing subscribers.

DAR 3-505 envisions that RFP amendments will be issued on SF 30. On occasion, however, agencies will amend solicitations by other means. See, e.g., B-167892(1), November 18, 1969; ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301; Cf., Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168. Generally, the failure to utilize the SF 30 is a procedural defect rather than a substantive one, provided that all potential offerors are advised of the changes made. B-167892(1), supra. Here, use of SF 30 would have accomplished nothing more than was done by using the letter amendment. SF 30 provides for identification of the solicitation, the date of the amendment, the issuing activity, etc. The identical requirements were included in the letter, albeit in a different format. Moreover, both Teleprompter and Foley acknowledged the letter, and we believe that acknowledgement in the best and final offer clearly would bind Foley to its contents.

#### IMPROPER NEGOTIATIONS

Teleprompter assertions in this regard are based upon a letter from the Air Force to Foley, which Teleprompter considers constituted discussions between Foley and the Air Force, thereby necessitating a new round of "best and final" offers. The letter requested Foley to provide information to correct minor irregularities in its offer.

The first irregularity involved apparent extension errors in items 4 and 5a of Schedule A. When the proposed connection charges of \$5 each for these two items are multiplied by the estimated quantities for the 10-year period, the extensions for items 4 and 5a are \$50 and \$10,425, respectively instead of the \$5 each erroneously shown. Foley verified that there were

typographical errors in items 4 and 5a in that there were errors in the extended prices for the two items.

DAR 3-805.5 (1976 ed.), as amended by Defense Procurement Circular 76-7, April 29, 1977 provides as follows:

"(a) Contracting officers shall examine all proposals \* \* \* for minor informalities or irregularities and mistakes \* \* \*.

"(b) Minor informalities or irregularities and apparent clerical mistakes shall be resolved substantially ~~as provided in~~ in 2-405 and 2-406.2, respectively, and communications with offerors required to resolve such matters shall not be considered discussions \* \* \*. However, if resulting clarification prejudices the interest of other offerors, award may not be made without discussions with all offerors within the competitive range." [Emphasis in original.]

DAR 2-406.2 provides:

"Any clerical mistake apparent on the face of a bid proposal may be corrected by the contracting officer prior to award, if the contracting officer has first obtained from the bidder written \* \* \* verification of the bid actually intended.  
\* \* \*"

We believe that there was an apparent clerical mistake on the face of Foley's offer and that the contracting officer sought appropriate resolution of the matter. The upward correction of Foley's offer did not prejudice the interest of Teleprompter as Foley's total price remained well below that of Teleprompter's. If anything, the correction enhanced Teleprompter's competitive position since it narrowed the cost difference between the proposals. We find the correction of the clerical errors in Foley's offer to have been in accordance with

DAR 3-805.5 and 2-406.2. See Fordel Films, Inc., B-186841, October 29, 1976, 76-2 CPD 370.

The second irregularity in Foley's "best and final" offer concerned the termination for convenience provision of the RFP. A breakdown of the stated costs by items was required to be submitted with the offer. In its first "best and final" offer, Foley submitted a breakdown of its fixed installation costs and inserted in clause 27(b) the amount of \$49,903 as the total. In its second "best and final" offer, Foley indicated the \$49,903 to represent net revenue loss it would suffer if the contract were terminated for the convenience of the Government. The contracting officer requested verification that the amount stated represented an amount not to exceed fixed installation cost for the CATV system less salvage value as previously indicated in Foley's cost breakdown submitted with the first "best and final" offer. Foley provided the verification requested.

We do not believe the statement added by Foley to its "best and final" offer represented a material change. The amount stated was clearly substantiated by the cost breakdown submitted with the first offer and did not change with the second offer. We think it is clear that Foley's response did not represent a change to its proposal such that another round of negotiations was required. See, e.g., Ensign Bickford Company, B-180844, August 14, 1974, 74-2 CPD 97.

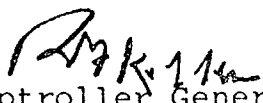
The third irregularity was Foley's failure to indicate the location where agents of the contractor responsible for making repairs could be contacted as required by the RFP. In its reply to the Air Force's request, Foley supplied a telephone number at which repair calls would be received.

We think this clearly involved a minor informality. Foley obligated itself to provide the required repair service and to have personnel available 24 hours per day. The absence of the telephone number did not vitiate that obligation. Thus, we believe the absence of the telephone number was merely a matter of form which properly could be corrected through the type of clarification request envisioned by DAR 3-805.5(b).

Thus, we do not find that the Air Force conducted negotiations improperly.

For the foregoing reasons, the protest is dismissed in part and denied in part.

Deputy

  
Comptroller General  
of the United States